Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates	)	WC Docket No. 03-228

COMMENTS OF AMERICATEL CORPORATION

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Introduction & Summary

Americatel Corporation ("Americatel"),[1] through counsel, respectfully submits its comments in response to the *NPRM* issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[2] The *NPRM* proposes weakening restrictions on the Bell Operating Companies ("BOCs") and their long distance affiliates ("Section 272 Affiliates") and asks several questions with respect to granting the BOCs further regulatory freedom.

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[1] Americatel, a Delaware corporation that is a subsidiary of ENTEL Chile, is a common carrier providing domestic and international telecommunications services. ENTEL Chile is the largest provider of long distance services in Chile and also provides wireless and competitive local services in the Chilean market. Americatel also operates as an Internet Service Provider ("ISP"). Americatel specializes in serving Hispanic communities throughout the United States, offering presubscribed (1+), dial-around, and prepaid long distance services, as well as private line and other high-speed services to its business customers. The majority of traffic carried by Americatel is dial-around in nature.

[2] *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, Notice of Proposed Rulemaking, WC Docket No. 03-228, FCC 03-272 (rel. Nov. 4, 2003) ("*NPRM*").

Americatel submits that, for the reasons discussed below, the answer to both of the Commission's questions is a resounding "**NO**." As stated by Americatel on several occasions and in various filings, the existing restrictions on BOCs and their Section 272 Affiliates already lack sufficient strength and control to protect fair competition. That situation, when coupled with a further loosening of the few existing restrictions on the BOCs and their Section 272 Affiliates, would create additional unfair competitive advantages for the BOCs and could even hasten the already quick path towards re-monopolization of the entire wireline market by the BOCs.[3]

The Commission has initiated an inquiry regarding its rules implementing Section 272(b)(1) of the Communications Act of 1934, as amended ("Act").[4] That law requires the BOCs to operate their Section 272 Affiliates independently from their local exchange carrier ("LEC") businesses. As Americatel has argued on other occasions, in order to maintain competition in the long distance market, the Commission must compel the BOCs to continue to provide long distance services only through separate subsidiaries and must impose additional requirements on and take additional steps with respect to, the BOCs and their Section 272 Affiliates, to wit:

> 1) the mandatory provision of billing and collection services to all carriers on the same terms and conditions that the BOCs provide those services to their affiliates, including the billing of long distance competitors' charges on the same invoice as the BOCs' own charges and the disconnection of all services for non-payment of long distance charges;

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[3] *See*, *e.g.*, Corrected Comments of Americatel in WC Docket No. 02-112 & CC Docket No. 00-175, filed June 30, 2003, at 22 *et seq.*

[4] 47 U.S.C. §272(b)(1).

2) the re-targeting of BOC price cap indices and access charges to the authorized rate of return and the imposition of a requirement that access charges be based on the BOCs' incremental costs to provide network connections;

3) the institution of streamlined procedures within the Enforcement Bureau's Investigations and Hearings Division to investigate and prosecute, when appropriate, any problems related to the interconnection of competitors to a BOC's network, as well as problems with respect to any other aspects of long distance competition;

4) the creation of additional Commission oversight of the BOCs' compliance with the Commission's rules for sharing Customer Proprietary Network Information ("CPNI") with their long distance affiliates; and

5) the mandatory disclosure by the BOCs (consistent with the CPNI rules) to competing carriers of all customer information in the BOCs' possession so that all long distance carriers can compete on a level playing field.[5]

Background

The Commission previously concluded that the "operate independently" language of Section 272(b)(1) imposes requirements on the BOCs' Section 272 Affiliates beyond those detailed in Section 272(b)(2)-(5) of the Act.[6] As a result thereof, the Commission adopted rules that prohibit a BOC and its Section 272 Affiliate from: (1) providing the operating, installation,

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[5] *See* Reply Comments of Americatel in WC Docket No. 02-112 & CC Docket No. 00-175, filed July 28, 2003, at 5-6.

[6] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report & Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, at ¶156 (1996) ("*Non-Accounting Safeguards Order"*), Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) ("*Non-Accounting Safeguards Second Order on Recon.")*, *aff'd sub nom. Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, 14 FCC Rcd 16299 (1999) ("*Non-Accounting Safeguards Third Order on Recon.")*. Section 272(b)(2)-(5) of the Act provides that a BOC's long distance affiliate "(2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the [BOC] of which it is an affiliate; (3) shall have separate officers, directors, and employees from the [BOC] of which it is an affiliate; (4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]; and (5) shall conduct all transactions with the

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and maintenance ("OI&M") services associated with each other's facilities;[7] and (2) jointly owning switching and transmission facilities or the land and buildings on which such facilities are located.[8]

The *NPRM* seeks comment on whether this OI&M sharing prohibition is an overly broad means of preventing cost misallocation or discrimination by the BOCs against their competitors. Additionally, the FCC seeks comment on whether the prohibition against joint ownership by BOCs and their Section 272 Affiliates of switching and transmission facilities, or the land and buildings on which such facilities are located, should be modified or eliminated.

OI&M Integration

The BOCs have urged the Commission to eliminate its rule mandating that the BOCs and their Section 272 Affiliates keep their respective OI&M functions and employees/contractors independent from each other. The BOCs claim that this rule imposes additional costs and unnecessary complexities on them.[9] According to the *NPRM*, the BOCs argue that this lack of operational integration caused by their compliance with the rule also

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> [BOC] of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection." 47 U.S.C. §272(b)(2)-(5).

[7] *See Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, at ¶¶158, 163-66; 47 C.F.R. §53.203(a)(2)-(3).

[8] *Id.*, 11 FCC Rcd 21905, at ¶¶158-62; 47 C.F.R. §53.203(a)(1).

[9] *NPRM*, at ¶8.

inhibits their ability to provide end-to-end services to customers and puts the BOCs at a disadvantage versus their competitors.[10]

The existence of separate affiliate requirements for the BOCs' long distance operations, including the mandatory separation of OI&M functions, does not put the BOCs at a disadvantage with respect to their competitors. Rather, those requirements put the BOCs and their Section 272 Affiliates in the same practical position as their competitors. The BOCs' legacy networks that are connected to virtually every premises in a geographic market give the BOCs an inherent advantage in serving customers. Absent the FCC's OI&M rules, this network ubiquity would permit a BOC and its Section 272 Affiliate to provide end-to-end service to customers without any need for inter-carrier coordination or additional investment. Moreover, this legacy network's customer density (*e.g.,* the number of end user customers per mile of distribution cable) provides a BOC and its Affiliate with economies of scale that simply cannot be matched by any competing carrier. Even in large urban markets, a competing carrier's customer density looks more like that of a rural LEC than that of a BOC in the same geographic market.

On the other hand, this same BOC network ubiquity forces competing carriers to coordinate with the BOCs in order to serve most customers, especially mass market ones. Competing carriers must rely on the BOCs for a portion of the facilities necessary to provide service. Therefore, the BOCs' competitors must coordinate operational, installation and maintenance activities with the BOCs for virtually every customer. While the BOCs' employees generally try to work with employees of the competing carriers to provide good customer

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[10] *Id.*

service, the simple need to coordinate activities of two carriers creates inefficiencies for the competitors. Americatel would agree that the BOCs and their Section 272 Affiliates also incur inefficiencies when they work together, but Americatel believes that there is no reason for the BOCs and their affiliates to avoid the challenges that every other competitor, including larger ones, such as AT&T or MCI, faces when it tries to provide service to its customers.

The currently effective OI&M rule places a BOC's Section 272 Affiliate in the same position as AT&T, MCI or Americatel in dealing with the BOC—it must coordinate with the BOC in order to provide and maintain service for customers. That seems only fair, unless the Commission desires to cede the entire market back to the BOCs.

Additionally, the elimination of the prohibition on OI&M sharing between a BOC and its Section 272 Affiliate could well result in impermissible cross-subsidies between the BOC and its affiliate. The BOCs would likely "pooh-pooh" this concern, arguing that price cap regulation is the "magic elixir" that fixes all cross-subsidy problems. Such is not the case. There is credible evidence that price cap regulation is ineffective in preventing BOC cross-subsidies. For example AT&T, in response to the *Further Notice* in WC Docket No. 02-112 and CC Docket No. 00-175,[11] provided the declaration of Dr. Lee Selwyn, a highly regarded and experienced telecommunications economist, demonstrating that price cap regulation "is not by itself sufficient

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[11] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements* and *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules,* Further Notice of Proposed Rulemaking, WC Docket No. 02-112 and CC Docket No. 00-175, FCC 03-111 (rel. May 19, 2003) ("*Further Notice*").

as a means for identifying or for preventing a BOC from using excess profits generated from monopoly local services to cross-subsidize competitive long distance services."[12]

Joint Network Ownership

When it first adopted its rules to implement Section 272(b)(1) of the Act, the Commission determined that the BOCs and their Section 272 Affiliates would not be permitted to maintain joint ownership of switches or transmission equipment, but did permit them to negotiate with each other for access to such facilities on an arm's length basis (*i.e.,* the way any competitor gains access to such facilities).[13] The Commission took that step to ensure that a "section 272 affiliate and its competitors enjoy the same level of access to the BOC's transmission and switching facilities."[14] This was not some new or unique safeguard devised by the Commission, but rather a continuation of the policies developed by the FCC in *Computer II*, in order to ensure that the BOCs did not discriminate in favor of their affiliates or against their competitors.[15] A regulatory tool that has, for many years, effectively protected fair competition should not be casually disregarded.

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12 Declaration of Dr. Lee Selwyn, attached to the Comments of AT&T filed in WC Docket No. 02-112 and CC Docket No. 00-175, at 93 (filed June 30, 2003). *See also,* Americatel Corporation's Reply Comments filed in WC Docket No. 02-112 & CC Docket No. 00-175, at 20-22 (filed July 28, 2003).

13 *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, at ¶15.

14 *Id*., at ¶158.

15 *Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer II")*, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979), Final Decision, 77 FCC 2d 384 (1980), *recon.*, 84 FCC 2d 50 (1980), *further recon*., 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). *Computer II* prohibited, *inter alia*, joint ownership of network facilities and required that a BOC affiliate providing enhanced services purchase transmission capacity from the BOC only at tariff rates.

Indeed, the courts have indicated that the Commission, while it possesses considerable discretion to change its prior policies, may not do so without having examined all relevant data and articulated a satisfactory explanation for its change.[16] For example, in the *State of California* case, the Ninth Circuit Court of Appeals vacated the Commission's elimination of the requirement for the BOCs to offer enhanced services only through a separate affiliate. The Commission had decided to abandon its separate affiliate requirement on the ground that "technological advances, political and regulatory pressures by the states, divestiture and a generally competitive enhanced services market had reduced the risks of both cross-subsidization and discriminatory access" (*i.e.,* the risks that the separate affiliate rule was designed to reduce).[17] Essentially, the Commission determined that the costs of maintaining separate subsidiaries outweighed the benefits generated by the requirement.

The Court concluded that the FCC's cost/benefit analysis was deficient. For example, according to the Court, the FCC failed to explain why an increase in competition in the unregulated enhanced services market would decrease the BOCs' market power in the local exchange market (where the BOCs had the ability and incentive to cross-subsidize their enhanced services offerings with monopoly revenues from captive ratepayers).[18] As noted above by Americatel and explained more specifically in Dr. Selwyn's declaration in WC Docket No. 02-112 and CC Docket No. 00-175, the BOCs are still in a position to cross-subsidize their competitive

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16 *People of the State of California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*State of California*").

17 *Id.,* 905 F.2d at 1230.

18 *Id*., at 1234.

services with revenues from their local exchange services.[19] Nothing has changed since the Court overturned the Commission's relaxed separate affiliate rules in 1990.

Similarly, the *State of California* Court rejected the Commission's conclusion that a separate affiliate requirement was not necessary because the local exchange market had become more competitive.[20] The BOCs argued and the Commission accepted that the availability of local bypass technology had become such a realistic option for customers that the BOCs' ability to shift costs from competitive enhanced services to the local exchange customers or exchange access customers had been significantly reduced.[21] The Court flat-out rejected the argument and the attendant conclusion, holding that there was no substantial record evidence that the BOCs could no longer extract monopoly rents from their ratepayers.[22]

The *State of California* Court's conclusion holds equally true today. While the BOCs do, indeed, face some local competition, they retain market power for local services, especially in the mass-market segment. Their market power is demonstrated by the fact that

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[19] *See* n.10, *supra.*

[20] *California*, 905 F.2d at 1234-35.

[21] *Id.*, at 1235.

[22] *Id.* Not surprisingly, the Antitrust Division of the U.S. Department of Justice ("DOJ") agrees that it would take much more than the availability of competitive alternatives or even the loss of some customers to those alternatives before it would agree that the local exchange market was truly competitive. On December 4, 2003, DOJ antitrust chief Hewitt Pate stated that, while wireless, the Internet and other modes of communications could result in line losses for the BOCs, such "data alone—while relevant—would not be sufficient to determine that there was enough competition to allow a merger [between a BOC and AT&T or MCI] to proceed." *Communications Daily*, December 5, 2003, at 14. Mr. Pate's concerns about the real lack of competition in the local exchange market should also be heeded by the Commission in the instant proceeding as it considers the premature lifting of competitive safeguards.

prices for local service have generally increased since 1996, rather than decreased, as one would expect in a competitive market.

For example, the FCC's most recent "Trends in Telephone Service" report concluded that "the average monthly local residential charge for service was $23.38 in October 2002 as compared to $19.72 in October 1992 and that the average price for a single-line business phone "was $43.59 in October 2002, as compared to $42.29 in October 1992."[23] That same report found that the Consumer Price Index ("CPI") for local service increased by 5.5% in 2000, 5.2% in 2001 and 4.5% in 2002.[24] On the other hand, in the truly more competitive wireless market, the average per-minute rate paid by consumers decreased over the same period of time.[25]

Competition drives prices lower for consumers. The wireless market is competitive, and, therefore, prices have fallen. The long distance market is very competitive, and prices have fallen accordingly. One must then conclude that local exchange market is not competitive because prices have actually increased.

Moreover, the BOCs are gaining significant shares of the long distance market, especially for mass-market customers. For example, the Washington Post recently reported that Verizon's Section 272 Affiliate has been selected as presubscribed long distance carrier by a full 50% of Verizon's residential customers.[26] This market development, in and of itself, is not negative or surprising. Rather, it seems consistent with the intent of Congress when it included a

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[23] Wireline Competition Bureau, "Trends in Telephone Service," August 2003, at 1-2.

[24] *Id.*, at Table 12.3.

[25] *Id.*, at Table 11.3.

[26] http://www.washingtonpost.com/wp-dyn/articles/A29768-2003Dec2.html (visited December 5, 2003).

process for the BOCs to reenter the long distance market in the 1996 amendments to the Act. However, Congress also clearly expected that there would be a significant number of the BOCs' mass-market customers shifting to other carriers for all or most of their services and that noteworthy price decreases for mass-market services would have occurred by now. Congress' expectation about local competition benefiting consumers through lower prices simply has not occurred. Accordingly, this is absolutely not the time to grant the BOCs more freedom to reintegrate their operations and reconsolidate their hold on the telecommunications market to pre-Divestiture levels.

Conclusion

For the reasons set forth above, the Commission should decline to weaken even more its current "operate independently" rules and should continue to require the BOCs and their Section 272 Affiliates to maintain separate OI&M functions and to maintain the prohibition against joint ownership of switching and transmission equipment between the BOCs and their Section 272 Affiliates. In addition, the Commission should also impose additional restrictions on the BOCs and their Section 272 Affiliates, including mandatory BOC provision of billing and

collection services to competitors; wholesale tightening of price cap regulation for the BOCs; creation of additional Commission oversight of the BOCs' marketing practices; and, to the extent permissible, BOC disclosure of consumer information to all carriers.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Lila A. Myers, do hereby certify that the foregoing **COMMENTS OF AMERICATEL CORPORATION** was served on this 8th day of December, 2003 upon the following by e-mail:

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